In the High Court of Punjab and Haryana, Chandigarh.

C.W.P. No. 9018 of 2005

Date of Decision: 21.11.2007

M/s Gurudev Overseas Limited, Ludhiana

…Petitioner

Versus

Central Board of Excise and Customs, New Delhi and Another.

…Respondents

CORAM: HON'BLE MR.JUSTICE RAJESH BINDAL

Present: Mr. Jagmohan Bansal, Advocate
for the petitioner.

Mr. Sanjeev Kaushik, Advocate
for respondent No.1.

RAJESH BINDAL, J.

The petitioner has approached this Court praying for quashing of circular No. 8 of 2006 dated January 17, 2006 and letter dated May 19, 2006 issued by Assistant Commissioner of Customs, Ludhiana, whereby the request of petitioner made by letter dated February 15, 2006 for permission to mutilate imported used rails was rejected and it was directed that the same is required to be classified under CTH 7302 as disc.

Briefly the facts, as stated in the petition, are that the petitioner is a public limited company engaged in the trading of imported raw material i.e. waste, scrap and re-rollable material. In the process, different types of scraps are imported which includes used rails. These used rails cannot be used as such in India by Railways but is considered as a re-rollable scrap. By circular No.1 of 2005 issued by the authorities, it was decided that the used rails shall be classified as scrap under chapter heading 7204 as used rails cannot be

used as such except as scrap. However, the classification made by the above referred circular was changed vide fresh circular No.8 of 2006 dated January 17, 2006, which is impugned in the present petition. It was clarified vide impugned circular that chapter heading 7204 would not cover used rails. It was further opined that the used rails will form part of chapter heading 7302 which specifically covers rails and as such include any used rails.

The waste and scrap falling under chapter heading 7204 is subjected to customs duty @ 5% and the rails falling under chapter heading 7302 are subjected to customs duty @ 12.5%.

According to the petitioner, the change was made, without any basis and reason therefor. It was further submitted that while issuing impugned circular No.8 of 2006, the authorities relied upon Section Note 8(a) to Section XV of the Customs Tariff Act, 1975, which clarified that waste and scrap shall be such goods which are not useable as such because of breakage, cutting up, wear or other reasons. Still further it is submitted that during 2002-2003, rails and part of rails falling under chapter heading 7302 were subject to levy of duty @ 30% and waste/scrap falling under chapter heading 7204 was subject to duty at the rate of 40%. Vide notification No.21/2002-Cus dated March 1, 2002, the Government prescribed concessional rate of duty for different products falling under chapter heading 1 to 99. Entry No.201 of the said notification provides 25% rate of duty on re-rollable scrap falling under chapter heading 7204 subject to the condition that such re-rollable scrap consists of seconds and defectives or cuttings/rejected ingots/slabs/blooms/ billets, bars, angels, shape and sections, rails, and railway materials, such as wheel, axles, sleepers, sleepers bars, fish plates and flat rolled products suitable for re-rolling without undergoing process of melting and of length 2000 mm. (maximum) width 800 mm (maximum), thickness/diameter 8mm. (minimum). In case of rails and railway materials, there will be no size restriction. Meaning thereby that the Government had extended the benefit of concessional rates of duty on used rails. It is further stated that in case there is apprehension of use of the goods imported for any other purpose, there is a provision for seizing the same. The problem arose to the petitioner on account of import of used rails after the petitioner entered into an agreement on April 22, 2006 with a UAE based exporter firm for the purchase of 2500 MT used rail scraps, which is meant for re-rolling.

In reply filed, the respondent contested the petition by raising plea of alternative remedy by stating that the classification of commodities under

one head or the other and as to whether the same attracts high or low rate of duty has to be decided on the facts of each case for which the Tribunal would be the appropriate authority. The duty is leviable as per the classification of the goods imported which has no relation with its intended use. It is further alleged that re-rolling is not the only purpose for which used rails are imported as the same can very well be used for other purposes after cleaning and sharpening. Prayer has been made for dismissal of the writ petition.

I have heard Mr. Jagmohan Bansal, Advocate, for the petitioner and Mr. Sanjeev Kaushik, Advocate, for the respondent and with their able assistance, perused the paper book.

Mr. Jagmohan Bansal, Advocate, learned counsel for the petitioner argued that once used rails had been classified under chapter heading 7204 treating the same to be a scrap, there was no good reason with the authorities for reviewing that decision and direct in the impugned circular that the used rails shall be covered under chapter heading 7302. The used rails imported by the petitioner is nothing but a scrap as the same had outlived its life. The same is used only for re-rolling and for no other similar purpose. Reliance has been placed upon the judgment of ***Madras Steel Re-rollers Association v. Union of India 2007 (217) Excise Law Times 167 (Madras),*** where the same circular No.8 of 2006 dated January 17, 2006 stood quashed.

On the other hand, Mr. Sanjeev Kaushik, Advocate, learned counsel for the respondents while reiterating the submissions made in the written statement contended that subsequent use of a product is no criteria to classify the same for the purpose of levy of customs duty at the time of import. Different persons importing the same material may use the same for different purposes. If that is the criteria there would be no uniformity in the levy of customs duty. All what has to be seen was as to what was the material being imported and under which entry the same falls. According to him used rails clearly fall under chapter heading 7302 which specifically covers rails without exclusion of used rails. Accordingly, the prayer was for dismissal of writ petition. However, he could not dispute the judgment rendered in ***Madras Steel Re-rollers Association's case*** *(supra)* as cited by learned counsel for the petitioner.

The relevant provisions of the Customs Act, 1962 namely Section 24, and Section XV of Chapter Note 8 of the Customs Tariff Act, 1975, are extracted here-below for ready reference:-

"Section 24. Power to make rules to denaturing or

mutilation of goods.

The Central Government may make rules for permitting at the request of the owner of the denaturing or mutilation of imported goods, which are ordinarily used for more than one purpose so as to render them unfit for one or more of such purposes; and where any goods are so denatured or mutilated they shall be chargeable to duty at such rate as would be applicable if the goods had been imported to the denatured or mutilated form.

Section XV. Base metals and articles of base metal

9. In this section, the following expression have the meaning assigned to them:

Waste and scrap:

Metal Waste and scrap from the manufacture or mechanical working of metal, and metal goods definitely not usable as such because of breakage, cutting up, wear or other reasons.

Chapter note is making it very clear that all metal goods, which cannot be used as such, are waste and scrap it is not disputed that used rail lines cannot be used as such. Respondent in its circular has also accepted that used rail lines cannot be used as such. There are so many reasons because of which used rail lines cannot be used as such in India. So, the respondent has misplaced reliance upon the chapter note. Chapter note favours stand of the petitioner and not respondent."

The circular No.1 of 2005 dated January 11, 2005 and impugned circular No. 8 of 2006 dated January 17, 2006 are reproduced below for ready reference:-

<u>Circular No.1 of 2005</u>

"The Board considered the alternative Headings of

72.04 and 73.02 for the item. The main point for discussion related to the policy restrictions on the import of used rails. Chapter 73 of CTA, 1975 specifically covers articles such as rails. In the case under reference, even though the items in question were in the form of rails, these bore markings of use and therefore these could not be used again as rails. Hence, suitable classification would be as scrap of CTH 72.04 and not as articles under heading 73.02. It has accordingly been decided by the Board that used steel rails for re-rolling were appropriately classifiable under CTC 72.04 and these were freely importable".

XXXX XXXX XXXX

Circular No.8 of 2006

"*Subject: Classification of used rails – Reg.*

I am directed to invite your attention to the Board's Circular No. 1/2005-Cus. Dated 11-1-2005 [2005 (179) E.L.T. T22] and the doubts expressed on the issue of appropriate classification of "used steel rails' – whether under CTH 7204 as 'ferrous waste and scrap' or under CTH 7302 as 'used rails'.

2. The issue of classification has been re-examined by the Board with respect to the clarification issued under Central Excise Tariff vide Circular No. 27 of 1989 dated 21.9.1989. The Board decided that heading No. 7204 read with Section Note 8(a) to Section XV of the First Schedule to the Customs Tariff Act and explanatory notes of Harmonized Commodity Description and Coding System (HSN) cover only such waste and scrap as would generally used for recovery of metal by re-melting or for the manufacture of chemicals. Such waste and scrap which is not for re-melting will have to be classified in the other appropriate headings of the tariff. Further, HSN notes to CTH 72.04, by example excludes structural steel work usable after renewal of worn-outs parts; worn railway lines which are usable as pitprops or may be covered

into other articles by re-rolling; steel files capable of reused after cleaning and sharpening. Accordingly, 'used rails' would not be covered by chapter heading 7204.

3. Further Board also noted that CTH 7302 specifically covers 'rails'. HSN Note on this heading provides that it covers all lengths of rails, all rails of the type normally used for railway or tramway track, irrespective of their intended use. There is no exclusion for 'used rails' from this CTH.

4. In view of the above and for the purpose of uniformity in classification, it is hereby clarified by the Board that the appropriate classification of used steel rails shall be under CTH 7302, and not under CTH 72.04 as ferrous waste and scrap. The instructions contained in para 8 of Board's circular No. 1/2005 may be considered as modified accordingly".

A Division Bench of Madras High Court in ***Madras Steel Re-rollers Association's case*** *(supra)*, while considering the validity of the impugned circular, opined as under:-

"8. The question whether the items imported by the member of the appellant are "used steel rails' or 'waste/scrap' is essentially a question of fact. That has to be decided by the authorities under the Act. It is well settled that the assessing authority while adjudicating the issue functions as a quasi-judicial authority. The power exercised by the appellate authority or the Central Government as revisional authority is also held to be a quasi-judicial power. It has been repeatedly held by the Supreme Court that the power exercised by these authorities is a quasi-judicial power and that power cannot be controlled by the directions issued by the Board. In *Orient Paper Mills v. Union of India (supra)* the question before the Collector was whether the paper declared as "M.G. Poster Paper" should be assessed as "packing and wrapping paper, other sorts". The assessing officer following a directive of the Board held that all types of poster paper of whatever colour including white should not be treated as "printing and writing paper" but as a "packing and wrapping paper". Allowing the appeal, the Supreme Court held in Para 8 as follows: (AIR at page 51)

"If the power exercised by the Collector was a quasi-judicial power – as we hold it to be – that power cannot be controlled by the directions issued by the Board. No authority however high placed can control the decision of a judicial or a quasi judicial authority. That is the essence of our judicial system. There is no provision in the Act empowering the Board to issue directions to the assessing authorities or the appellate authorities in the matter of deciding disputes between the persons who are called upon to pay duty and the department. It is true that the assessing authorities as well as the appellate authorities are judges in their own cause; yet when they are called upon to decide disputes arising under the Act they must act independently and impartially. They cannot be said to act independently if their judgment is controlled by the directions given by others. Then it is a misnomer to call their orders as their judgments; they would essentially be the judgments of the authority that gave the directions and which authority had given those judgments without hearing the aggrieved party. The only provision under which the Board can issue directions is Rule 233 of the Rules framed under the Act. That rule says that the Board and the Collectors may issue written instructions providing for any supplemental matters arising out of these Rules. Under this Rule the only instruction that the Board can issue is that relating to administrative matters; otherwise that rule will have to be considered as *ultra vires S*ection 35 of the Act."

The Court further held in Para 12 as follows: (AIR at page 52)

"....From these notes it is clear that at any rate the correctness of the direction issued by the Board was put in issue during the hearing of the revision applications. That apart, we are clearly of the opinion that even if the question of the legality of the directions issued by the Board had not been taken before the

> authorities under the Act, as that direction completely vitiates the proceedings and makes a mockery of the judicial process, we think we ought to consider the legality of that direction. For the reasons already mentioned, we hold that direction was invalid and the same has vitiated the proceedings before the Collector as well as the Government" (emphasis supplied)

9. In *Mahadayal Premchandra v. Commercial Tax Officer, Calcutta* (AIR 1958 SC 667) the Supreme Court held that the Commercial Officer while assessing certain transactions should not have solicited instructions from the Assistant Commissioner, nor should he have acted on the basis of those instructions. It was further held that the instructions given by the Assistant Commissioner had vitiated the entire proceedings as "the procedure adopted was, to say the least, unfair and was calculated to undermine the confidence of the public in the impartial and fair administration of the sales tax department".

10. In *Rajagopal Naidu v. State Transport Appellate Tribunal* (AIR 1964 SC 1573) Gajendragadkar, C.J. Speaking for the Court observed thus: (AIR at page 1579)

> "In reaching this conclusion, we have been influenced by certain other considerations which are both relevant and material. In interpreting Section 43A we think, it would be legitimate to assume that the legislature intended to respect the basic and elementary postulate of the rule of law, that in exercising their authority and in discharging their quasi-judicial function, the tribunals constituted under the Act must be left absolutely free to deal with the matter according to their best judgment. It is the essence of fair and objective administration of law that the decision of the Judge or the Tribunal must be absolutely unfettered by any extraneous guidance by the executive or administrative wing of the State. If the exercise of discretion conferred on a quasi-judicial tribunal is controlled by any such direction, that forges fetters son (sic on) the exercise of quasi-judicial authority and the presence of such fetters

would make the exercise of such authority completely inconsistent with the well accepted notion of judicial process. It is true that law can regulate the exercise of judicial powers. It may indicate by specific provisions on what matters the Tribunals constituted by it should adjudicate. It may by specific provisions lay down the principles which have to be followed by the Tribunals in dealing with the said matters. The scope of the jurisdiction of the Tribunals constituted by statute can well be regulated by the Statue and principles for guidance of the said Tribunals may also be prescribed subject of course to the inevitable requirement that these provisions do not contravene the fundamental rights guaranteed by the Constitution. But what law and the provisions of law may legitimately do cannot be permitted to be done by administrative or executive orders. This position is so well established that we are reluctant to hold that in enacting Section 43A of the Madras Legislature intended to confer power on the State Government to invade the domain of the exercise of judicial power. In fact, if such had been the intention of the Madras Legislature and had been the true effect of the provisions of Section 43A, Section 43A itself would amount to an unreasonable contravention of fundamental rights of citizens and may have to be struck down as unconstitutional. That is why the Madras High Court dealing with the validity of Section 43A had expressly observed that what Section 43A purported to do was to clothe the Government with the authority to issue directions of an administrative character and nothing more. It is somewhat unfortunate that though judicial decisions have always emphasized this aspect of the matter, occasion did not arise so long to consider the validity of the Government Order which on the construction suggested by the respondent would clearly invade the domain of quasi-judicial administration".

11. In *Tata Teleservices Limited v. Commissioner of Customs,* 2006 (194) E.L.T. 11 (S.C.) the Supreme Court considered the validity of the Circular issued by the Central Board of Excise and Customs defining the phrase "Cellular phones" mentioned at item No.13 of the exemption notification by saying that a telephone would not be considered as a cellular phone merely because it works on cellular technology. The Supreme Court has observed in para 10 as follows (E.L.T. at page 14)

> "We are of the view that the reasoning of the Bombay Bench of the Tribunal as well as that of the Andhra Pradesh High Court must be affirmed and the decision of the Delhi Tribunal set aside insofar as it relates to the eligibility of LSP 340 to the benefit of the exemption notification. The Andhra Pradesh High Court was correct in coming to the conclusion that the Board had, in the impugned circular, pre-determined the issue of common parlance that was a matter of evidence and should have been left to the Department to establish before the adjudicating authorities. The Bombay Bench was also correct in its conclusion that the circular sought to impose a limitation on the exemption notification which the exemption notification itself did not provide. It was not open to the Board to whittle down the exemption notification in such a manner. The exemption notification merely reproduced the language of Entry 8525-20-17 and since the exemption notification merely reproduced the tariff entry, the limitation sought to be imposed by the Board would tantamount also to reading the limitation into the classification itself. Since the issue would be ultimately a question of evidence the onus was on the Department to prove by appropriate evidence that the goods were classifiable under 8525-20-19 being the residuary entry. This the Department could have done by negativing the claim of importers that the goods were classifiable under Tariff Entry 8525-20-17 and by establishing that the imported goods could not

reasonably be classified under any other head. In this particular case the onus had not been discharged by the Revenue. The only evidence on record was the opinion sought for by the Ministry of Finance itself and given by the Department of Telecommunications to the effect that the Model LSP 340 was in fact covered by the phrase "cellular telephone". Since there is no dispute that the technology used in LSP 340 and the hand held mobile phone is the same there is no warrant to limit either the tariff entry or the exemption notification to hand held cellular phones. Neither the range nor the size would make any difference."

12. Section 151 A of the Customs Act confers the power to issue direction only with respect to classification of the goods and with respect to levy of customs duty so long as it does not affect the quasi-judicial power of the authorities. The Board has no power to interfere with the quasi-judicial powers of assessing officer or for that matter the appellate authority or revisional authority. In our opinion, the impugned Circular is beyond the powers conferred on the Board under Section 151 A of the Act and the same is liable to be quashed and set aside…."

Still further safeguard in the form of provision of Section 24 of the Act is available, which enables the Central Government to frame Rules for permitting for denaturing or mutilation of the imported goods, which are ordinarily used for more than one purpose and charge duty thereon as if the goods in the position as mutilated or denatured were imported. The petitioner in the present case as well had requested for mutilation of the rails to cover any apprehension of the respondents about the reuse of the rails as such.

In ***Steel Authority of India v. Collector of Customs, Bombay 2000 (115) Excise Law Times 42 (SC)***, Hon'ble the Supreme Court considering the issue as to whether a trade notice issued by the customs authorities in one State is applicable in the other State as well, opined as under:-

"Learned counsel for the Revenue submitted that this trade notice had been issued only by the Bombay Customs House. It is hardly to be supposed that the Customs authorities can take

one stand in one State and another stand in another State. The trade notice issued by one Customs House must bind all Customs authorities and, if it is erroneous, it should be withdrawn or amended, which in the instance case, admittedly, has not been done".

A Division Bench of Gujarat High Court in ***Arvind Boards & Paper Products Limited v. Commissioner of Income-tax, Gujarat-IV (1982) 137 Income Tax Reports 635*** while considering a similar issue with regard to interpretation of an all India Taxing Statute, opined as under:-

".....Secondly, in income-tax matters, which are governed by an all-India statute, when there is a decision of another High Court on the interpretation of a statutory provision, it would be a wise judicial policy and practice not to take a different view (whatever one's own view may be), barring, of course, certain exceptions like where the decision is *sub silentio, per incuriam, obiter dicta* or based on a concession or takes a view which it is impossible to arrive at or there is another view in the field or there is a subsequent amendment of the statute or reversal or implied overruling of the decision by a higher Court or some such or similar infirmity is manifestly perceivable in the decision".

The same view was expressed by a Division Bench of Delhi High Court in ***Commissioner of Income-tax v. Sae Head Office Monthly Paid Employees Welfare Trust (2004)271 Income Tax Reports 159.***

From the perusal of judgment of Hon'ble the Supreme Court of India in ***Steel Authority of India's case*** *(supra)* and that of Gujarat High Court and Delhi High Court in ***Arvind Boards's case*** and ***Sae Head Office Monthly Paid Employees Welfare Trust's case*** *(supra)*, it is clear that in the case of a Central Taxing Statute in case an interpretation adopted by one Court is available, the same is normally to be followed unless a conclusion so arrived at is impossible to reach.

In the present case, the issue regarding validity of the impugned circular has already been gone into by a Division Bench of Madras High Court in ***Madras Steel Re-rollers Association's case*** *(supra)* and learned counsel for the respondent had not been able to point out as to on what account the conclusion arrived at by the Madras High Court can be said to be *sub silentio, per incuriam, obiter dicta.*

Accordingly, following the judgment of Madras High Court in ***Madras Steel Re-rollers Association's case*** *(supra),* the impugned circular No. 8 of 2006 dated January 17, 2006 and all proceedings consequent thereupon are declared illegal.

The writ petition is disposed of , accordingly.

(Rajesh Bindal)
Judge

November 21, 2007
"DK"